Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 885.

Platt vs. The Union Pacific Railroad Company.

Supplemental Brief for the Defendants.

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There would seem to be three general questions for discussion, namely:—

1st. Assuming the legal character of defendants' title to the lands in question, under its charter and by its patent, to be an absolute fee, subject, however, to be defeated in part or whole by the non-performance of a condition subsequent,—which is the most favorable view for the Plaintiff,—Is a conveyance in mortgage a performance of that condition *pro tanto*, so as to exclude as against such mortgage the exercise of the rights of pre-emption referred to and forming part of the clause containing the condition subsequent?

2d. If such condition exists, and if a mortgage be not a performance of such condition, still, unless and until the Government, by entry for non-performance, by legislation or other legal method, shall avail of the breach, can the charter rightly construed be deemed to confer on the public, at the end of the three years, the immediate rights of pre-emption without further action of the Government?

3d. Does the Act in question create a common law condition —or merely reserve a power of revocation in the event and manner set out in the Act?

Upon the question whether a mortgage is a disposition of lands within the words or intent of the third section of the charter, it may be remarked at the outset that it is unnecessary to search that charter to find if the power to mortgage any of its property is expressly or impliedly conferred on the corporation. Such power, it is well settled, is one of the clear incidental rights attached to every corporation, unless restrained in terms or by implication; (with the exception, however, of the right to mortgage its franchise, which is inalienable, without the consent of the State.) Nor is it necessary to discuss the question whether a mortgage by a railroad company of all its property (omitting or expressly excluding its franchise), which would of necessity disable it to perform its functions, may be void as against the public policy of the State which created it. The case in hand is one of a mortgage of property in no way connected with or affecting the performance of any of the duties of the Company to the public.

The true question under this branch of the inquiry is, whether, from the scope of the charter or the terms of its third section, it was designed to deprive the Company of the well settled power of all corporations to dispose of its property by mortgage to meet its necessities, in the course of constructing the road, and to confine its mode of disposition to absolute sales by which its title should be completely divested, *so that even contracts for the sale of parcels, not consummated within the prescribed period, would be void and fruitless.*

This question is to be answered by a consideration :—

First. Of the defined and limited purposes of the grant of lands and of the object to be obtained by the Government.

Second. Whether those purposes could probably be effectuated by confining the powers of disposition to absolute sales and transfers.

Third. By weighing the precise terms and conditions attached to the grants to find if, by just construction, they have thus limited the power of disposition to absolute sales and transfers.

I

It is indisputable, we submit, that the grant was made with the intent and purpose of *furnishing in some way present assist-*

ance toward the constantly recurring expenditures requisite as the construction of the road progressed, and that it was not a gift or endowment intended to be available to the contractors only when all should be completed, and then to furnish an ultimate indemnity or source of profit, as the case might be. Both the title of the Act and the words of the section making this grant declare it to be so made, namely, for the purpose of "*aiding in the construction of said road.*"

Immediate resources to carry on a work involving so many millions before it could be completed, — without which resources even the largest capitalist would not dare to engage in the enterprise, — must, we think, aside from the language of the Act, be deemed to be the intent of Congress.

The lands thus granted for these purposes were lands situated in what may be called a desert. For the purposes of absolute sale and conveyance they were wholly valueless until, by completion of the road, purchases and settlement could be induced; and such is, in substance, declared to be true by this Court in the case of United States *v.* Union Pacific Railroad Company. 1 Otto, p. 89.

When this Act was passed, it was matter of public history that grants of this character to railway companies to aid in their construction had been quite uniformly made available for this purpose in the only mode in which they could be utilized, namely, by mortgage; and farther, even when, by the completion of the road, absolute sales were practicable, such sales could be effected only in parcels, — usually by contracts, and on long credits. The pre-emption laws of the Government itself are founded on these well-known facts.

We submit, then, that if the purpose of the grant was to aid in the construction of the road as it progressed, it ought not to be construed, unless the terms imperatively demand it, to limit the power of disposition to absolute sales and conveyances of absolute title, since such limitation would defeat the expressed design and purposes of the Act.

II.

We come then to the question whether, assuming the grant to be of the character above stated, namely, a grant defeasible by non-performance of a condition subsequent, there is anything in

the terms of that condition so repugnant to a disposition by mortgage of the lands granted, that, although the obvious intent of the Act would seem to be aid in the construction of the road as the work progressed, yet it must be held that such aid by mortgage could not have been contemplated.

1st. The words of the statute are, "*sold or disposed of.*" It will be conceded, we think, that, by the canons of interpretation, the words "disposed of" cannot be rejected unless found clearly repugnant to the whole scope and clear purpose of the law.

2d. It will, we think, be further conceded that if the words "disposed of" are not to be rejected, those words are apt words to cover a transfer by mortgage.

3d. Any argument for its rejection or to limit its interpretation so as to exclude the transfer by mortgage must rest therefore upon its supposed repugnance to the clause which provides that "all such lands so granted by this section which shall not be sold "*or disposed of* within three years after the entire road shall have "been completed, shall be subject to settlement and pre-emption "like other lands, at a price not exceeding one dollar and twenty-"five cents per acre, to be paid to said Company."

III.

The argument that such repugnance exists must seemingly rest upon one or both of the following propositions: —

a. That the clause clearly indicates a purpose and policy of the Government not to allow at the end of three years any part of this body of lands to be withdrawn from settlement and held by the grantees for an indefinite period, the subject of speculation and of prices exceeding those of the public lands, founded on their enhanced value, caused by the construction of the road.

b. That to allow the lands to be mortgaged, and thus withdrawn from pre-emption, might, by an adroit exercise of the power, altogether defeat that policy.

In discussing these objections, we desire to restate that defendant's argument, thus far, in answer to the supposed repugnance arising out of the foregoing suggestions, is based upon the assumption that the character of the grant is that of a fee defeasi-

ble by non-performance of condition subsequent, and that the controversy is not whether such is the legal character of the grant, but, assuming it to be of that character, whether a mortgage is a performance of the condition. It will be seen in the sequel that the defendant denies that such is the character of the grant.

As to the supposed repugnancy founded on the asserted policy of the government to avoid a monopoly: —

First. It is clear that the leading, primary policy of the Act is, by offers of aid to be utilized as the work progressed, to secure the completion of the road. When it was found that the original grant would be inadequate to effect this policy, Government, by the Act of 1874, doubled the grant.

Second. Its secondary, subordinate policy was, that all remnants of the grant which from any cause, (whether because other resources should prove sufficient, or from the impossibility of so disposing of the whole of the grant as to utilize it completely in construction), should, on the ascertainment of the fact, be by future legislation subject, at the will of Congress, to pre-emption.

Third. Such being the two features of public policy disclosed by the Act, are its provisions to be construed to intend, by a restriction of the powers of disposition, to absolute sales and conveyances to ensure that all remnants not thus utilized for the purposes of the grant should be and continue in such shape as to be subject to pre-emption, although such restriction would necessarily impair and might possibly defeat the leading purpose of the grant?

Or was it the design to leave the mode of disposition to the grantee, to be governed by its opportunities and wants, but with the proviso that any remnants not affected by such disposition should, at the will of Congress, be subject to pre-emption?

Fourth. That it was the purpose of the Act to allow any

mode of disposing of the lands which would secure its primary purpose, and not to secure all that could be saved for the purposes of pre-emption, is clear, when it is seen that under its provisions the entire grant might be disposed of by absolute conveyance with warranty to land companies or associated parties for the purpose of obtaining means to aid in the construction. Can it be deemed that, with such conceded powers conferred by the Act, it was nevertheless the policy of the Government to exclude the power of effecting the same ends by mortgage?

Fifth. Was it the policy of the Act to exclude all time contracts for sales in parcels to settlers and others on long credits, with the usual renewed indulgences? It is obvious that the risk to such purchasers of the ultimate defeat of title at the expiration of three years from the wholly uncertain period of the completion of the road, would entirely exclude that usual mode of disposing of wild lands.

Sixth. It is submitted that if the policy of the Act was, as we contend, to enable the Government, by legislation, to subject to pre-emption the remnants of the grant not used to accomplish its leading purpose, yet, that the mortgage in question does not defeat that policy or withdraw such remnants from subjection to that pre-emption.

As will be seen hereafter, this mortgage is a conveyance in trust to sell in parcels and with the proceeds discharge the mortgage debt. This debt matures in 1887. If the debt shall be satisfied before maturity by partial sales, the remnants revert to the Company, and may thus be made subjects of pre-emption. If all shall, however, have been sold and prove insufficient to extinguish the debt, the lands will have been disposed of without remnants for the very purposes contemplated by the Act.

Should the Corporation apply its other resources to pay, in part or in whole, the debt, the lands remaining unsold, would, in like manner, be subject to pre-emption.

True the remnants might not be enhanced within the three years. But the mortgage was an indeate disposition, & the remnants, if any, would not have been disposed of within the three years.

Whether such fraudulent use of the power would be valid, we need not inquire. The existence of a power is not to be negatived by pointing out its possible abuse. The case in hand it will not be contended shows any other than a fair and necessary use for the purposes designed by the grant.

IV.

It is not the purpose of this brief to discuss the question whether a mortgage is technically a disposition of land, nor whether it is technically to be held to carry a fee simple or a mere lien. On this point we refer to the discussion of the authorities contained in the opening brief, and we more readily make this omission because it is thought, whatever may be the exact legal effect of a mortgage, the controversy must, as it would seem, turn on the question whether, looking at the asserted policy of the Act, any technical definition of the mortgage will not be overruled if that policy be as asserted by the plaintiff. It may be added, however, that no legislation of the Territory in which these lands are situated, passed after the mortgage was executed, delaring a mortgage to be a mere lien, can affect the rights of the parties under it; and that the only legislation referred to by the plaintiff is contained in the General Statutes of Nebraska (where these lands are situated) passed in 1873, seven years after this mortgage was made.

V.

A word upon the features of the mortgage in question. It purports to convey a fee by proper technical words. It enables and requires in all sales a conveyance by the Trustees of a fee; the title is never to revest in the grantor until and unless after such sales and payments of the debt there is a remnant. The management of the sales is intrusted to the company, but the title of purchasers must under it be derived from the Trustees, the mortgagor joining simply to confirm the just exercise of the power given to the Trustees.

There is, however, a clause near the end of the mortgage which is deemed important by the plaintiff. It is as follows: "It "is hereby declared by the parties to this indenture that all the "provisions of said Acts of Congress, so far as they are applicable,

"are hereby made, and shall be deemed and taken to be, a part of "this instrument, and the said provisions, in all that concerns the "sale and disposal of the said lands hereby conveyed to the parties "of the second part, are to be observed, and strictly and faith- "fully carried out and fulfilled."

It must be admitted that the purpose of that portion of the clause which provides that "said provisions in all that concerns "the sale and disposal of the said lands hereby conveyed * * are "to be observed and strictly and faithfully carried out and ful- "filled," is somewhat obscure.

1st. It is clear that the clause has reference to *some duties imposed on the Company by the Act, which are to be "strictly and faithfully carried out and performed,"* and that these duties are duties which concern the sale "and disposal of the land."

Now, there is no duty in relation to the sale or disposal of lands to be "strictly performed and faithfully carried out," by the Company, except the implied duty to apply the proceeds of the sales of the land strictly and exclusively to the defined uses for which the grant was made, namely, "for the purpose of aiding in the construction of the road."

The provisions of the 3d section, that all lands not sold or disposed of by the Company within three years might be subject to pre-emption *was not a promise or covenant by the Company to be "strictly and faithfully carried out and fulfilled."* It gave the Company an alternative either to dispose of the lands within three years, or to have any residue exposed to pre-emption.

2d. The clause under discussion is inserted in a mortgage given to secure ten million four hundred thousand dollars of bonds, payable in twenty years from April 16, 1867. It looks to the sales of the lands in parcels and on credit. The road was, on the face of the Act, to be completed July 1, 1875; there was not a word in the mortgage which indicates that sales of land were, whatever might be the consequences, to be forced and completed within three years afterwards, that is to say, by July 1, 1878, (or earlier, if the road should have been, as it was, completed earlier). Nor is there any provision in the mortgage to meet this latter contingency. On the contrary, the mortgage contemplates that during the whole twenty years from April 16, 1867, and at the expiration

of that period, that is to say, 1887, for twelve years after the road is, by the Act, completed, there will be lands, by the sales of which, on failure to pay either principal or interest, the trustees are to realize the debt.

This provision of the mortgage can by no possibility be reconciled with the assumed construction of the clause in question, namely, that its purpose was by covenant or otherwise to compel sales of all the lands on or before July 1, 1878, three years after the completion of the road. It is submitted that if such had been the intent, it would have been expressly declared, and the mortgage shaped accordingly, and that for these reasons the clause under discussion is not to be construed as restricting sales by the mortgagees to the period of three years after completion. It may be added that, upon plaintiff's construction of the clause, failure to complete the sales within three years would deprive the mortgagee of even the one dollar and twenty-five cents per acre, to be paid by pre-emptors, since that, by the Act, is to be paid to the Company, and thus lost by the mortgagees as part of their security, by reason of their non-compliance with the supposed condition or covenant.

VI.

The argument, thus far, assumes that the clause under discussion constitutes a condition subsequent, and in this view we have presented the defendant's grounds for claiming that even, if so, the condition has been performed by the execution of a mortgage. If it shall be held that the mortgage was not a performance, there next arises the question, Does a breach of the condition at once reinvest the title in the Government, so that, if the Act be construed to grant to the public immediate rights of pre-emption, without further legislation, those rights attach to the land? and we submit: —

1st. That to avail of a breach of condition contained in a conveyance of land, the Government, like any other grantor, must, by entry, "office found, or other proper proceedings, to assert its rights" (see Tucker *vs.* Ferguson, 22 Wall. 527, 571), cause its title to be *revested*, and that, until such entry, or other proceeding, the title remains still vested in the grantee, and will continue so vested forever, until and unless the grantor chooses to enter for breach. This doctrine is too familiar to need any citation of

the text-books. It is, perhaps, most clearly stated in 4 Kent's Commentaries, pp. 124 *et seq.*

VIII.

If, then, the clause does not create a condition, it must be construed, we submit, as a mere contract as to the future use of lands undisposed of, or as the reservation of a power of revocation, which is, by contract, to be used at the election of the grantor, and when used to be limited as to its effect and as to subsequent proceedings under it, in a manner agreed upon, and which forms part of the power of revocation.

It will be perceived, however, that the mode of such user, after breach, is not completely defined by the Act. The land is to be subject to pre-emption, *but the price is to be fixed the settler, in its discretion, by the Government*, with the single proviso that it shall not be fixed at "exceeding one dollar and twenty-five cents per acre," which price, when fixed and realized, is "to be paid to said company."

Of course, until the Government shall by legislation have determined to exercise, and shall have by legal proceedings exercised this power of revocation, and farther, shall have determined at what price,—"not exceeding one dollar and twenty-five cents per acre,"—it will open the lands to pre-emption, no such pre-emption can possibly take place.

Indeed, it is left somewhat doubtful by the Act whether, after Government has, by legislation, declared its purpose to exercise its power of revocation, and fixed the price at which the lands shall be subject to pre-emption, it is intended that the machinery for such pre-emption is to be carried out by the Company, and the fixed price be paid by pre-emptors directly to the Company. The words, "like other lands," clearly indicate that the formularies of pre-emption are to be used; but it can hardly, we think, have been intended or perhaps possible to have thrust upon the company the execution or carrying into effect of the detailed Government regulations for pre-emption.

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